memorandum of law, Petitioner was admittedly put on notice of the *defense*, but he was not in any way put on notice of the District Court's contemplation of *summary judgment*. Since the Respondent never moved for summary judgment and since the District Court never announced its contemplation of summary judgment under Rule 12 (b), Petitioner had no notice whatsoever of pending summary judgment.

The District Court entered no order or notice in Civil Action No. 13818 except its order granting summary judgment in favor of Respondent. The only correspondence which Petitioner received from the District Court after the case at bar was filed, pertained only to an order directing Respondent to show cause in the companion Civil Action No. 10463, why Petitioner's voluntary dismissal of C. A. 10463 as to Respondent should not be upheld.

In stating that Petitioner "has never articulated a single concrete reason why he should not be estopped" (Brief in Opp., p. 8), Respondent gives the impression that Petitioner is under some burden to meet an affirmative defense that was never established in the District Court. Respondent *invoked* the affirmative defense of collateral estoppel, but it has not shown and cannot show this Court that it carried the burden of establishing such a defense. Respondent never submitted "matters outside the pleading" sufficient to trigger the proper use of Rule 12 (b). Indeed, without submitting the record of the prior NLRB hearing to the District Court, the Respondent had no way of establishing for purposes of collateral estoppel that the LMRDA issues regarding Petitioner's discharge had in fact been tried, and that there were no genuine

issues which remained to be tried. As the Court of Appeals held in affirming the District Court's *refusal* to grant summary judgment in the companion Civil Action No. 10463:

> "By no stretch of the imagination can the Xerox copies of opinions of this Court attached to a memorandum of law submitted by Grand Lodge in connection with the Rule 12 (b) (6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12 (b) (6) motion into a motion for summary judgment." (Pet. C-7)

And as this Court stated in *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 160 (1970):

> "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*"

Plainly, Petitioner has no burden to meet an affirmative defense where, as here, the Respondent has not carried the initial burden of presenting evidentiary matter in support of its motion.

In this area of procedural due process under Rules 12 (b) and 56 (c), there are controlling facts which Respondent has not denied. Petitioner was not given notice of summary judgment, a hearing, or any reasonable opportunity to present matters in opposition to summary judgment. Respondent has not refuted and cannot refute the fact that the District Court did not comply with Petitioner's procedural rights under the Federal Rules. Petitioner respectfully asserts that these facts alone are sufficient to motivate the exercise of this Court's power of supervision, even if that supervision is limited merely to a summary reversal of the decision below.

By quoting the Rules and Regulations of the NLRB, Respondent has sought to show that Petitioner "had the right to participate as a party as fully as he chose . . ., and he elected instead to have his interest at the hearing prosecuted by the NLRB General Counsel." (Brief in Opp., p. 8). But in quoting the Board's rules, Respondent omitted the crucial portion italicized below:

> §102.38 Rights of parties.—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, *except that the participation of any party shall be limited to the extent permitted by the trial examiner:* And provided further, That documentary evidence shall be submitted in duplicate. (Emphasis added). 29 C. F. R. §102.38 (1970).

As may readily be seen from the Board's own rule, Petitioner's participation in the NLRB hearing was subject to the trial examiner's discretion, and Nix had no absolute "right" to control or participate in the proceedings. Nowhere does it appear in the record that Petitioner was able to participate other than by giving his own oral testimony. Petitioner sat powerless in the hearing, unable to have his LMRDA rights presented or considered, not by his own choice but because the trial examiner had informed Board counsel that Petitioner would not be permitted to participate.

Respondent quotes the decision of this Court in *United States v. Utah Construction & Mining Co.*, 384 U. S. 394, 422 (1966) for the proposition that the courts have not hesitated to apply *res judicata* to administrative agency decisions. (Brief in Opp., p. 7). But such doctrines of finality are not appropriate where,

as here, disputed LMRDA rights were never properly before the NLRB, nor did Petitioner have an opportunity in fact or theory to litigate his LMRDA rights.

Respondent misapplies those cases cited as authority for giving collateral estoppel effect to the findings of the NLRB in this case. (Brief in Opp., p. 7, n. 4). The critical distinction to be recognized is that the NLRB *and* the federal courts have *primary* jurisdiction to determine the existence of secondary boycotts. In such a situation there exists no strict jurisdictional dichotomy such as that existing between the NLRB under the NLRA and the federal courts under the Landrum-Griffin Act.

Contrary to the inference made by Respondent, the petitioner does not assert that the trial examiner or the Board attorneys were prejudiced. (Brief in Opp., p. 9). Petitioner recognizes that these men were primarily concerned with determining whether the employer union was guilty of unfair labor practices, and not whether the union had unlawfully disciplined Nix for exercising his LMRDA rights. (Pet., p. 16). Theoretically, Petitioner's LMRDA rights as a union member could have been presented in the NLRB hearing, and the trial examiner could have concluded that Petitioner had been fired for exercising his membership rights and fiduciary duties in exposing union corruption. But these speculations concern a subject which Congress has entrusted to the federal courts and not the NLRB.

On what basis could the trial examiner have awarded relief for a violation of the LMRDA? And even if the trial examiner had presumed to reinstate Petitioner on the basis of his Landrum-Griffin Act rights, the Board could not have awarded the broad injunctive relief or the damages appropriate in this case. Indeed, had the

trial examiner or the NLRB overstepped their jurisdiction in such a manner, it is the Respondent who would be entitled to cry foul, and who doubtlessly would now be seeking to defend its LMRDA liability before the proper forum—the federal courts.

Respondent states that "Petitioner explicitly disclaims any desire to show the existence of any circumstances which would establish that he is not appropriately estopped by the NLRB finding . . . ." (Brief in Opp., p. 9). Here again Respondent looks to Petitioner to meet an affirmative defense which Respondent has invoked but never established with evidentiary support. Respondent would have Petitioner argue the facts of his case before this Court. But Petitioner has been denied the opportunity to build a trial record on his LMRDA rights. That is precisely why Petitioner has come to this Court with an important question of federal labor law jurisdiction.

One final point needs to be addressed. While the NLRB is clearly empowered, in the enforcement of the NLRA, to find the cause of an employee's discharge (Brief in Opp., p. 9), it is not empowered to determine under the LMRDA whether a union official has been unlawfully disciplined for the exercise of protected LMRDA rights. The latter finding is not within the competence of the NLRB because the NLRB does not concern itself with the essence of LMRDA claims—internal union affairs.

The NLRB functions well as a mediator of the economic strife between corporate employers and their organized employees. But the Board thinks mainly in employer-employee terms and not in terms of the union-member relationship. The distinction is extremely

critical, because it represents fundamental differences in perception between the NLRB under the NLRA and the federal courts under the LMRDA. Had petitioner merely been some corporate official who caught his superior defrauding the corporation, there is no law which would have prevented his discharge, laudable as his intentions might have been. But in the union-member context Congress has decreed that union members shall have certain rights and be able to exercise those rights free of unlawful discipline. And one of those rights is the right to keep one's union free of the very financial corruption and abuses which prompted the passage of the LMRDA. Nix stood in the position of a fiduciary under §501 (a) of the LMRDA. (Pet., 2-E). However in the strange world of union ethics, the man who gets documentary proof of his superior's embezzlement is denounced as a "pilferer" and fired from his job, while the union vice president who was caught embezzling union funds makes restitution and continues to draw a fat salary. One wonders if anyone is keeping that vice president honest now. If union officials, who occupy positions of trust and who because of their intimate knowledge of internal union affairs stand the only chance of discovering union corruption in high places, can be discharged in the name of "pilfering" when they discover the financial abuses of their superiors, then unions and their treasuries have lost their best watchdogs and Title V of the LMRDA has become largely a hollow promise. The late Joseph A. Yablonski paid for such watchfulness—first with his job and then with his life.

CONCLUSION

Petitioner has presented two questions which merit review. In light of the abridgement of Petitioner's due process rights, perhaps it is time that this Court reaffirm the due process requirements of summary judgment procedure and remind the federal courts that these procedures were not conceived as loose guidelines subject to judicial waiver, but rather as protective checklists which, when followed, safeguard the substantive federal rights of all parties. In light of the purposes of the LMRDA, the exclusive jurisdiction of the federal courts over it, the NLRB's lack of jurisdiction over and concern with internal union affairs, and the Board's inability to provide broad redress to the unlawfully disciplined union member, it is Petitioner's earnest contention that these factors should preclude preemption of federal court jurisdiction over the LMRDA by application of the doctrine of collateral estoppel to an NLRB proceeding. Accordingly it is requested that the petition for writ of certiorari be granted.

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Petitioner,

By _____
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing Reply Memorandum upon the Respondent by mailing a copy of same, with postage first-class prepaid, addressed to Adair, Goldthwaite, Stanford & Daniel, 600 Rhodes-Haverty Building, Atlanta, Georgia 30303, counsel of record for Respondent.

This 9th day of May, 1972.

WILLIAM G. MCRAE
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